Filed 10/20/14 In re Jerry C. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re Jerry C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JERRY C., Defendant and Appellant.	A138798 (San Mateo County Super. Ct. No. JV79627)

The juvenile court found that Jerry C. sexually molested a four-year-girl by use of force, duress, menace or fear of immediate and unlawful bodily injury (Pen. Code, § 288, subd. (b)(1)). The victim, who was seven years old at the time of trial, was not formally sworn as a witness, but the prosecution established her competence to distinguish truth from fiction and elicited her promise to tell the truth. Jerry argues that her promise to tell the truth did not fulfill statutory or constitutional requirements for admissible testimony. He also argues there was insufficient evidence to establish the element of duress or force in commission of the offense. Jerry further challenges several probation conditions as vague or overbroad and asks us to correct two errors in the trial record. We will order modification of certain of the probation conditions and direct correction of the trial record. We otherwise affirm.

I. BACKGROUND

In August 2012, the Santa Clara County District Attorney filed a juvenile wardship petition pursuant to Welfare and Institutions Code section 602, subdivision (a) on behalf of Jerry, who was then 17 years old. The petition alleged that Jerry committed a lewd or lascivious act on "Doe" in 2009[1] (when she was four years old and Jerry was 14) by use of force, duress, menace or fear of immediate and unlawful bodily injury. (Pen. Code, § 288, subd. (b)(1).)

A contested jurisdiction hearing took place in April 2013. Doe's mother, S.R., testified that Jerry's aunt, A.G., was like a mother to her and she considered Jerry to be her own nephew.[2] In 2009, Jerry sometimes visited or stayed with A.G. at her home in Milpitas. S.R. lived in Los Banos but worked in San Jose, so she stayed with A.G. during the work week and returned home on the weekends. While S.R. was at work, Doe and Doe's baby sister stayed with A.G., and they sometimes stayed with A.G. when S.R. returned to Los Banos. Doe attended school in Milpitas. Sometime in late 2009, when Doe was about five years old, Doe was at home with S.R. and others naming people she considered to be her brothers. S.R. asked Doe why she had not named Jerry. Doe said she did not like Jerry because he "touched" or was "digging" in her "cuckoo," a term she used to refer to her genitalia. Doe said Jerry had locked the front door and touched her there with his hand. The incident apparently had occurred in the summer of 2009. S.R. did not report the incident to police, but she moved Doe to a school in Los Banos so Doe would have no further contact with Jerry.

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[1] The original petition alleged that the incident occurred in 1999, before Doe was born. In April 2013, an amended petition was filed to correct the date to 2009.

[2] The principal figures in this case are part of an informal extended family in which members are referred to as relatives even if they have no biological or marriage relationship. We adopt those informal designations in our recital of facts because they do not affect the issues before us.

In 2012, S.R. was contacted at home by a social worker who advised her that Doe had told someone at school that a 13-year-old boy sexually assaulted her.[3] S.R. told the social worker what Doe had disclosed in 2009. They talked to Doe again about the incident and she added some details. Doe said Jerry made humping gestures and tried to put his "ding ding," which S.R. understood to mean his penis, in her "cuckoo." Doe said "he tried, but that he used his hand." Doe also said A.G.'s son, Jason, was locked out of the house during the incident. The matter was reported to the police, who interviewed Doe.

Doe's Testimony

When Doe was called to testify, she was not formally sworn as a witness. After some preliminary questions by the court, the prosecutor engaged in the following colloquy with her:

"Q. Okay. Now, it's real important that you tell the truth here today. And I just want to ask you: What color shirt am I wearing?

"A. It's kind of bluish and purplish. [¶] . . . [¶]

"Q. [I]f I said I was wearing a white shirt, would that be a truth or a lie?

"A. Lie.

"Q. Is it good or bad to tell a lie?

"A. Bad.

"Q. All right. So you promise to tell the truth here today?

"A. Yes.

"Q. Okay. Now, also, I want to ask you a question. . . . [¶] . . . [¶] . . . [T]ake this hand. Is this inside or outside my jacket pocket? (Indicating.)

"A. In.

"Q. Okay. And how about now?

"A. Out.

[3] A school nurse, as a mandated reporter, advised the social worker that Doe reported her "private part" hurt and told classmates a 13-year-old boy locked her in a room at her grandmother's house and had sex with her when she was five years old.

"[Prosecutor]: All right. May the record reflect, Your Honor, I put it inside and then I put it outside.

"THE COURT: It will so reflect."

After asking a few questions about Doe's age and school, the prosecutor said, "If there's no further questions regarding competency, Your Honor." Defense counsel said, "No. I would submit." The court then found that Doe was competent to testify.

Doe testified that Jerry touched her between her legs on the skin with his hand in a way she did not like. His hand went inside her "cuckoo," which felt "icky." She testified the incident occurred at A.G.'s house, but then said she was not sure. Doe said Jerry had locked the door to the room as well as the door to the house. Jerry told her if she told A.G. about the incident then A.G. would not love her anymore. Doe later told her parents and a classmate in school. None of the other boys or men in her family had touched her the way Jerry did. On cross-examination, Doe testified that Jason was the only other person home during the incident and that he came into the room after the incident and punched Jerry.

Jason testified that in 2009 he was about 10 years old and living with A.G. One day, he, Jerry and Doe were in the house alone, running around and playing a form of hide and seek. Jason ran outside to the front yard and hid in the garage. When he realized he wasn't being pursued, he returned to the front door, but it was locked. He went to a bedroom window, but it was closed, so he returned to the front door and banged on it. Finally, about five to 10 minutes after Jason had left the house and less than a minute after he started banging on the door, Jerry opened the door. Jerry had his usual demeanor. Doe was sitting on the bed in the front room and her demeanor was unusual: she was "sitting there and she didn't say anything," even though "she's usually, like, really happy and smiling and stuff." In five to 10 minutes, she returned to her normal demeanor. Jason did not argue with or punch Jerry. Jason explained that A.G. slept on a bed in the "front room," which was basically a bedroom. The front room could be accessed from the kitchen through a doorless opening and from the backyard through the back door, and it had multiple windows. Within A.G.'s house, only the room where

another adult lived (Perry, S.R.'s stepfather) could be locked with a key, but the front and back doors could be locked with keys.

A.G. confirmed that she slept in what she called the family room in back of the house. It was an open room converted from a patio, with a door to the backyard but no interior door. The children tended to gather there to play or watch television and often sat on her bed. A.G. testified that Jerry was "a 13 year old with kind of a mentality and friskiness of like a ten-year-old kid." A.G. acknowledged that she received a telephone call from S.R. reporting Doe's allegations that Jerry had touched her private parts. She did not recall any details from S.R.'s call because she started crying when she heard the news. A.G. then spoke to Jerry, who was then living with his father in Fremont, on the telephone. She told him about Doe's disclosure and accused him of lying to her when he earlier claimed that he had been inappropriately touched by Perry. Jerry remained silent while she reprimanded him. At the end of the conversation, Jerry said he was sorry, although he did not say whether he was apologizing for lying about Perry or for molesting Doe.

Jerry testified that he recalled an incident when Jason was locked out of the house while Jerry and Doe were inside and no one else was home. The three kids were playing a game like hide and seek and Jason ran outside of the house. Jerry locked the door as a joke and watched from a window. He saw Jason run into the garage as if he was being chased, and after a while return and knock on the door. Jerry opened the door and they continued playing. Jerry had watched from the window the whole time and did not take Doe into a bedroom or touch her private parts. He did not recall ever being in a locked bedroom with Doe. Jason never punched Jerry in the face. Jerry first heard about Doe's accusation about one or two weeks after he had told his parents that Perry had touched him. Jerry spoke to A.G. on the phone about the accusation against Perry. A.G. did not tell him about the Doe accusation during that phone call, and Jerry did not admit to lying about Perry or apologizing for anything during the call.

The court found S.R., Doe, A.G., and Jason to be credible witnesses. It specifically found that Doe did not appear to be coached, and she seemed to listen

attentively and answer as honestly and carefully as possible while on the witness stand. Doe was also credible because her demeanor visibly changed when she was asked where Jerry had touched her and she pointed between her legs. Moreover, the way Doe had disclosed the incident to other family members—in casual conversation when she was not in trouble—and the consistency in her accounts in 2009 and 2012 persuaded the court that Doe was credible and not coached. The court found that Doe's testimony about two locked doors was consistent with the front and back doors to the house being locked. Jason's testimony about noticing a change in Doe's demeanor also corroborated Doe's story. The court also found significant Jerry's failure to deny the incident when confronted by A.G. The court dismissed the defense theory that Doe made the accusation in retaliation for Jerry's accusation against Perry because "that's really way too sophisticated for [Doe] to come up with or for [Doe] to do" and because S.R. tried to protect Jerry from the legal consequences of his conduct.

On April 16, 2013, the juvenile court for Santa Clara County sustained the petition and set the maximum term of confinement at eight years. The matter was transferred for disposition to San Mateo County where Jerry was residing and on felony adult probation in another case. After a disposition hearing on May 9, 2013, Jerry was placed in the San Mateo County Youth Services Center for one year and conditions of probation were imposed.

II. DISCUSSION

A. *Admissibility of Doe's Testimony*

Jerry first argues that Doe's testimony was not competent evidence to support the court's jurisdiction finding because Doe did not testify under oath as required by statute and by the federal constitution. We find no error.

1. *Statutory Claim*

Jerry argues that Doe's promise to tell the truth failed to meet statutory requirements for an oath because it was elicited by the prosecutor rather than administered and sworn by the court or clerk. He also argues these circumstances inadequately impressed upon Doe her duty to testify truthfully.

"As a general rule, 'every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.' (Evid. Code, § 700; see Pen. Code, § 1321.) A person may be disqualified as a witness for one of two reasons: (1) the witness is incapable of expressing himself or herself so as to be understood, or (2) the witness is incapable of understanding the duty to tell the truth. (Evid. Code, § 701, subd. (a).)" (*People v. Mincey* (1992) 2 Cal.4th 408, 444.) The "capacity of a person to understand the duty of a witness to tell the truth is a preliminary fact to competency of a person to testify as a witness." (*People v. Farley* (1979) 90 Cal.App.3d 851, 869, italics omitted.) "The party challenging the witness bears the burden of proving disqualification, and a trial court's determination will be upheld in the absence of a clear abuse of discretion. [Citation.]" (*People v. Mincey*, at p. 444.)

"[L]ive testimony is conditioned, among other things, on the witness's capacity to understand the duty to tell the truth ([Evid. Code,] § 701, subd. (a)(2)), and on his promise under oath or penalty of perjury to testify truthfully. (*Id*., § 710; see *id*., § 165 [broadly defining oath]; Code Civ. Proc., § 2094, subds. (a) & (b) [describing form of oath]; Pen. Code, §§ 118–129 [punishing perjury].) These rules convey the need for honesty and the sanction for false testimony. They also enhance credibility determinations. (See *California v. Green* (1970) 399 U.S. 149, 158.)" (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608, parallel citations omitted.) Testimony provided by a witness who did not swear an oath is not "evidence" that can be used to convict a criminal defendant. (*People v. Gooch* (1983) 139 Cal.App.3d 342, 345; Evid. Code, §§ 140, 710.)

Typically, in both civil and criminal cases, an oath is "administered by obtaining an affirmative response to one of the following questions: [¶] (1) 'Do you solemnly state that the evidence you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth, so help you God?' [¶] [or] (2) 'Do you solemnly state, under penalty of perjury, that the evidence that you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth?' " (Code Civ. Proc., § 2094, subd. (a); *People v. O'Connor* (1941) 44 Cal.App.2d 301, 304.) Alternatively, "the court

may administer an oath, *affirmation, or declaration* in an action or a proceeding in a manner that is calculated to awaken the person's conscience and impress the person's mind with the duty to tell the truth. The court shall satisfy itself that the person testifying understands that his or her testimony is being given under penalty of perjury." (Code Civ. Proc., § 2094, subd. (b), italics added.) A different rule, however, applies to young children. Evidence Code section 710 provides: "Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law, *except that a child under the age of 10* or a dependent person with a substantial cognitive impairment*, in the court's discretion, may be required only to promise to tell the truth*." (Italics added.)

Here, in establishing Doe's competence as a witness, the prosecutor asked Doe, "Is it good or bad to tell a lie?" and Doe responded, "Bad." He then asked Doe, "So you promise to tell the truth here today?" and Doe replied, "Yes." Jerry's counsel did not object to the voir dire's adequacy or to the sufficiency of Doe's responsive affirmation that she would tell the truth. If counsel was dissatisfied with Doe's answers, he was required to request further inquiry. (*People v. Berry* (1968) 260 Cal.App.2d 649, 652–653.) Statutory claims that a witness did not swear an oath or that the witness's oath was inadequate are subject to forfeiture for failure to raise a timely objection. (*Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 377; *People v. Carreon* (1984) 151 Cal.App.3d 559, 579–581.) Jerry made no timely objection, and his statutory claim is therefore forfeited.

In any event, the claim lacks merit. The statute expressly grants the court latitude in choosing the specific form of the oath or affirmation. (Code Civ. Proc., § 2094, subd. (b).) The specific wording of an oath is also committed to the trial court's discretion and every presumption will be drawn in favor of the regularity of the proceedings. (*People v. O'Connor, supra,* 44 Cal.App.2d at pp. 304–305.) Case law has long recognized that the standard oath is incomprehensible to and thus ineffective for many child witnesses, and that the better practice is to modify the oath for such witnesses. (See *People v. Berry, supra,* 260 Cal.App.2d at p. 652; see *Trigueiro v. Skow* (1937) 24 Cal.App.2d 253, 254–255.) Jerry contends that Doe was not adequately

informed of the fact that she would be subject to punishment for false testimony. While a child witness must demonstrate a moral sensibility to realize that she should tell the truth and that punishment was likely if she lied (*People v. McIntyre* (1967) 256 Cal.App.2d 894, 898–899), "an actual direct threat of punishment for not telling the truth is not a prerequisite for a trial court's determination that a person is competent to be a witness" (*People v. Mincey, supra,* 2 Cal.4th at p. 444). Here, the examination adequately demonstrated that Doe "understood the difference between truth and falsehood and appreciated that she had to tell the truth." (*People v. Dennis* (1998) 17 Cal.4th 468, 525; see *People v. Mincey,* at p. 444.)

Jerry also objects that the prosecutor, rather than the court (or court clerk), administered the "oath." He notes that Code of Civil Procedure section 2094, subdivision (b) provides that "*the court* may administer an [alternative] oath," in which case "[*t*]*he court* shall satisfy itself that the person testifying understands that his or her testimony is being given under penalty of perjury." (Italics added.) However, Jerry cites no authority holding that an oath may *only* be administered directly by the court or court clerk. We note that subdivision (a) of the statute, which sets forth two standard oaths, does not specify who should administer the oath. Jerry argues an oath administered by the court would be more effective, because Doe would have understood she needed to tell the court the actual truth, whereas she might have understood that the prosecutor was asking her to say what the prosecutor understood was the truth, i.e., she needed to say what she had previously told the prosecution about Jerry. While it might have been better practice for the court to directly elicit Doe's promise to tell the truth, we find no authority for the proposition that failure to do so is error, particularly in light of Jerry's failure to object at the hearing.

Jerry specifically objects that the question about whether a blue shirt was white did not adequately convey the importance of not telling lies that are not obviously untrue. These questions, however, were directed at establishing Doe's competence to testify pursuant to Evidence Code section 701, subdivision (a)(2) and Jerry raises no claim of incompetency on that basis on appeal.

2. *Constitutional Claim*

Jerry argues the oath failed to meet constitutional requirements, and that Evidence Code section 710 is unconstitutional in this context. We again find no error.

The federal and state constitutions guarantee criminal defendants the right to confront the witnesses against them. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; see also Pen. Code, § 686.) This right applies to state juvenile delinquency hearings. (*In re Gault* (1966) 387 U.S. 1, 12, 56–57; Welf. & Inst. Code, § 702.5.) "[T]he right guaranteed by the Confrontation Clause includes not only a 'personal examination,' [citation], but also '(1) *insures that the witness will give his statements under oath*—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.' [(*California v. Green*, *supra*, 399 U.S., at p. 158, fn. omitted.)]" (*Maryland v. Craig* (1990) 497 U.S. 836, 845–846, italics added.)[4]

Confrontation clause claims are also subject to forfeiture for failure to object. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 314, fn. 3.) Jerry failed to assert any claim of inadequacy of the oath at the time of the jurisdiction hearing, and his claim is forfeited.

In any event, we find Jerry's constitutional claim to be of dubious validity at best. "[T]here is no constitutionally . . . required form of oath." (*U.S. v. Ward* (9th Cir. 1992) 989 F.2d 1015, 1019; see also *Moore v. United States* (1955) 348 U.S. 966.) For example, rule 603 of the Federal Rules of Evidence (28 U.S.C.), much like Code of Civil

[4] The People cite a juvenile dependency case, *In re Heather H.* (1988) 200 Cal.App.3d 91, 96, for the proposition that " '[n]o constitutional provision is violated when unsworn testimony is received.' " However, the validity of such a proposition in the delinquency context is questionable in light of *Maryland v. Craig*. (See *Griffin v. Harrington* (2012) 915 F.Supp.2d 1091, 1105.)

Procedure section 2094, subdivision (b), simply provides, "Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." Here, before testifying, Doe demonstrated that she understood the difference between the truth and a lie, acknowledged it was "bad" to lie, and promised to tell the truth in court. While a more thorough voir dire or more direct inquiry by the court might have been better practice, Jerry has not shown that the promise by Doe to tell the truth was, in this context, so inadequate as an oath as to constitute error of constitutional dimension.

Jerry also argues that "[s]ince framing-era law did not recognize any confrontation exceptions for child witnesses, the Legislature lacks authority to devise one now," and contends that *Crawford v. Washington* requires us to adopt an originalist interpretation of the confrontation clause. (See *Crawford v. Washington* (2004) 541 U.S. 36, 42–43 [confrontation clause text ambiguous, requiring consideration of historical background].) We note that the Supreme Court does not always interpret the Constitution as Jerry urges, and we do not consider ourselves bound to that particular approach. (See *id.* at p. 60 [discussing *Ohio v. Roberts* (1980) 448 U.S. 56]; see also *Maryland v. Craig*, *supra*, 497 U.S. at pp. 845–848, 851–857 [holding that each element of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—is not an absolute requirement in every criminal case as long as other protections of the confrontation clause are observed].) Nothing in *Maryland v. Craig* suggests that use of an analog or alternative form of oath for the testimony of a young child renders that testimony, which remains subject to cross-examination, so inherently unreliable as to violate confrontation clause protections.

3. *Ineffective Assistance of Counsel*

Jerry argues that, to the extent state law or confrontation clause claims were forfeited by failure of his trial counsel to make timely objection, he received ineffective assistance of counsel. Because we find Jerry's challenges to the admissibility of Doe's testimony fail on the merits, his claim that trial counsel was ineffective for failure to raise objections to the testimony also necessarily fail. A defendant seeking reversal for

ineffective assistance of counsel must prove both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.) Jerry establishes no error in the admission of Doe's testimony, and therefore cannot establish prejudice.

B. *Duress or Force*

Jerry argues there was insufficient evidence of force or duress to support his conviction for Penal Code section 288, subdivision (b)(1) (section 288(b)(1)). We disagree.

When a conviction is challenged on the ground of insufficient evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

" '[D]uress,' as used in section 288(b)(1), means ' "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." ' [Citations.]" (*People v. Soto* (2011) 51 Cal.4th 229, 246, italics & fn. omitted.) " ' "The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress." [Citation.]' [Citations.] 'Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family.' [Citations.]" (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

As the People note, evidence of duress here included the significant age difference between Jerry and Doe, Jerry being the oldest person at home at the time of the incident, and Jerry's locking of a door or doors prior to inappropriately touching Doe. The People

argue that duress was also evidenced by Jerry's statement to Doe that A.G. would no longer love her if she told A.G. about the incident.[5]

Many courts have affirmed section 288(b)(1) convictions based on duress where the victim was under 10 years old and the defendant was a much older family member or trusted family friend, even in the absence of explicit threats or locked doors. (See *People v. Veale*, *supra*, 160 Cal.App.4th at pp. 46–48 [reviewing cases].) In *People v. Veale*, for example, the defendant molested his seven-year-old stepdaughter (on one occasion behind a locked door). The victim was afraid of getting in trouble if she reported the molestation, although the defendant had never explicitly threatened her and she could not articulate why she feared the defendant. (*Id.* at pp. 43–45.) The court held, "[T]he evidence is sufficient to support a finding of duress, based on [the victim's] age and size; her relationship to defendant; and her testimony that she feared defendant and feared he would harm or kill her or mother if she told anyone defendant was molesting her. . . . It could be reasonably inferred that defendant threatened [the victim] implicitly or explicitly, based on her fear of defendant . . . ." (*Id.* at pp. 48–49; see also *People v. Cochran* (2002) 103 Cal.App.4th 8, 15–16 [duress found where defendant's nine-year-old daughter was directed to engage in videotaped sexual acts despite obvious reluctance, evasive behavior and complaints of pain]; *People v. Schulz* (1992) 2 Cal.App.4th 999, 1002, 1004–1005 [duress found on basis of adult defendant's psychological and physical dominance over nine-year-old niece]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 44–45, 50–51 [duress found where adult stranger molested eight-year-old outdoors near school without making explicit threat], disapproved on another ground by *People v. Soto*, *supra*, 51 Cal.4th at p. 248, fn. 12.) Jerry argues these cases are distinguishable because the defendants were adults, whereas the conduct here took place between two minors. The distinction is not dispositive. As our high court has observed, in enacting

[5] Jerry argues he could not have committed the offense "by use of" this statement because it was made after the single alleged incident of touching. We need not resolve this dispute because we conclude there was sufficient evidence of duress even absent the statement.

section 288 the California Legislature "recognized that there is an inherent imbalance of power in an encounter between a child and an adult bent on sexual conduct. It acted to protect young children, who may make ill-advised 'choices' when under the coercive influence of an overreaching adult." (*People v. Soto, supra,* 51 Cal.4th at pp. 245–246.) In the parent-child context, courts have held that "as a factual matter, when the victim is as young as [nine years old] and is molested by her father in the family home, in all but the rarest cases duress will be present." (*People v. Cochran, supra,* 103 Cal.App.4th at p. 16, fn. 6; see *People v. Veale, supra,* 160 Cal.App.4th at p. 49 [quoting *People v. Cochran*].) In our view, the same is true when a victim as young as four years old is molested by a much older minor family member. The age, size and maturity difference between a 14-year-old[6] and a four-year-old is substantial and we have no difficulty affirming the court's finding that the circumstances were coercive from Doe's perspective, thus supporting a finding of duress.

Jerry argues there was insufficient evidence that he locked Doe inside a bedroom. We find the evidence of duress sufficient even absent this additional evidence. Nevertheless, we agree with the People that the evidence of a locked door further supported the finding of duress. Jerry parses the trial testimony to argue the evidence established only that one door was locked, implying that other means of egress were available to Doe. Assuming that to be the case, a reasonable factfinder could still find that Jerry's act of locking a door would cause a four-year-old to conclude that she was not free to or was not supposed to leave the room where he molested her even if other methods of egress were unobstructed. This act, combined with Jerry's substantially greater age and size, his trusted role as a family member, and his temporary position as the oldest person present in the household, was sufficient to support the duress finding.

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[6] Citing A.G.'s testimony about his immaturity, Jerry argues he "had the mentality of a 10-year-old" and therefore was unable to exercise any implied authority over Doe. A.G., however, did not testify to any lack of mental capacity (versus emotional maturity) on Jerry's part, nor did she suggest that his physical size was that of a 10-year-old. From the perspective of a four-year-old child, age and size difference are readily apparent, emotional maturity presumably less so.

C. *Probation Conditions*

Jerry argues that several of his probation conditions are vague or overbroad. He requests specific modifications to the conditions, including personal knowledge requirements. The People assent to some of the requested modifications, but object to others. We agree that several of the probation conditions require modification.

"[Welfare and Institutions Code] section 730, subdivision (b), provides that the [juvenile] court may impose 'any and all reasonable [probation] conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' [¶] The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. '[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ." ' [Citation.] . . . Thus, ' " 'a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.' " ' [Citations.] [¶] Of course, the juvenile court's discretion is not boundless. Under the void for vagueness doctrine, based on the due process concept of fair warning, an order ' "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." ' [Citation.] The doctrine invalidates a condition of probation ' " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " ' [Citation.] By failing to clearly define the prohibited conduct, a vague condition of probation allows law enforcement and the courts to apply the restriction on an ' " 'ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' " ' [Citation.] [¶] In addition, the overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. [Citations.]" (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910, italics omitted.)

1. *Gang Gatherings*

The first contested probation condition prohibits Jerry from "be[ing] in the following areas known to be where gang members meet or get together for gang-related activity." Although the condition refers to "the following areas," no specific areas are listed. In his opening brief, Jerry asked us to modify the condition to require personal knowledge that locations are places where gangs gather for gang activity, and to define "gang activity." The People ask us to remand to the trial court to specify the areas Jerry may not visit. In his reply, Jerry agrees with the remand recommendation. However, he also asks the court to strike the language "known to be where gang members meet or get together for gang-related activity," arguing the language is vague and unnecessary. The People correctly note, however, that because the condition will specify the areas Jerry cannot visit, the vagueness of the descriptive language is immaterial.

We therefore strike the condition as currently written. On remand, the court may reinstate the condition if it either designates specific areas Jerry may not visit or delegates the specification task to the probation department, subject to challenge by Jerry pursuant to Welfare and Institutions Code section 778. (See *In re Victor L., supra,* 182 Cal.App.4th at pp. 917–919; *id.* at p. 919 [holding "a court may dictate the basic policy of a condition of probation, leaving specification of details to the probation officer" and recognizing efficiency of this process].)

2. *Gang-Related Activity*

The second contested condition prohibits Jerry from "participat[ing] in any gang-related activity or any activity the Subject knows is prohibited by the probation officer as gang-related activity." Jerry argues the phrase "gang-related activity" is vague and overbroad, the probation officer's discretion to prohibit activity is insufficiently fettered, and the condition must include a personal knowledge requirement. He asks us to modify the condition to read: "The Subject shall not knowingly engage in activities that are known to him to advance, benefit or promote a criminal street gang as defined in Penal Code section 186.22(f)." The People disagree that the term "gang-related activity" is vague or overbroad or grants the probation officer unfettered discretion, but agree the

condition should include a personal knowledge requirement. They argue the condition should be modified to read: "The Subject shall not knowingly participate in any gang-related activity."

Jerry's reliance on *In re Victor L.* is misplaced and he misreads the case. The condition under review in that case prohibited the probationer from going to *areas* known by him for gang-related activity. (*In re Victor L., supra*, 182 Cal.App.4th at p. 913.) In that context, the court observed that gang "activity" might include gang members' mailing a letter or shopping for groceries for the benefit of the gang or in association with gang members, thus raising the possibility the probationer "might be guilty of violating probation simply by shopping *at the same grocery store* or using *the same post office* that other gang members patronize." (*Id.* at p. 915, italics added.) The court held the vaguely-worded condition "could be misapplied by law enforcement unless further specification were provided." (*Ibid.*) The court did not hold that it would be inappropriate to forbid a minor at risk of gang affiliation or membership from any and all gang activity—including shopping with other gang members or going to the post office with them. Indeed, Jerry appears to concede such a condition is appropriate because he does not challenge the probation condition that prohibits him from associating with any person known by him to be a gang member.

People v. O'Neil, cited by Jerry, is also distinguishable where an adult probation condition provided: " 'You shall not associate socially, nor be present at any time, at any place, public or private, with any person, as designated by your probation officer.' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1354.) The court struck down the condition, holding it was "unlimited and would allow the probation officer to banish the defendant by forbidding contact with his family and close friends, even though such a prohibition may have no relationship to the state's interest in reforming and rehabilitating the defendant. The trial court could not impose such a restriction and it may not authorize the probation department to do so." (*Id.* at p. 1358.) Here, the challenged probation condition is restricted to "gang-related activity" and thus does not grant

unfettered discretion to the probation officer. (Accord, *In re Victor L., supra*, 182 Cal.App.4th at pp. 918–919.)

In sum, we agree with the People that the phrase "gang-related activity" is not impermissibly vague or overbroad. Moreover, because the word "gang" is defined in a prior probation condition to mean "a 'criminal street gang' as defined in Penal Code Section 186.22(f)," it need not be redefined in this subsequent probation condition. (See *In re Victor L., supra*, 182 Cal.App.4th at p. 914.) We therefore modify this condition to read: "The Subject shall not knowingly participate in any gang-related activity."

3. *Gang Signs*

Jerry next challenges a condition stating that he may not "wear, possess, or display any clothing or item or display any hand signs with gang significance or which are indications of gang membership, e.g., colors, symbols, insignias, numbers, monikers, patterns, etc., known by the Subject to be such, as may be identified as such by law enforcement or probation officers." Jerry argues the condition is vague because it is grammatically convoluted, "gang significance" and "etc." are undefined, and items or signs that would violate the condition are not specified. He also argues it is overbroad because it impinges on his liberty interests and right to free expression, as any color may be gang-related. He further takes issue with the personal knowledge language, contending it is inadequate because it is unclear which portion of the condition is modified by the language. He asks us to modify the condition to read: "The Subject shall not wear, possess or display any clothing, insignias, emblems, badges, buttons or signs that he knows, or that the probation officer informs him, are evidence of affiliation with or membership in a criminal street gang [as defined in Penal Code section 186.22(f)]." (Brackets in original.) The People contend the condition is proper as imposed.

To support his vagueness argument, Jerry cites the dispositions in two decisions which modify similar gang-signs conditions of probation. (See *In re Vincent G.* (2008) 162 Cal.App.4th 238, 247–248; *People v. Leon* (2010) 181 Cal.App.4th 943, 954–955.) These dispositions, however, are not authority mandating that every similar probation

condition adopt the exact wording. Indeed, one of these decisions specifically states, "We do not intend to hold that all gang-related conditions of probation should be worded as we order in this case. We recognize that the parties may agree to gang conditions with different wording as long as they appropriately tailor the conditions to the defendant's offenses and rehabilitation." (*People v. Leon*, at p. 950, fn. 1.) As Jerry acknowledges, another appellate decision modified a probation condition to include virtually the same phrase that he objects to here, "of gang significance." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 638.)

Jerry argues "with gang significance" is vague "because it fails to specify what items or signs would violate the condition." However, he does not propose a remand for such specification. Instead, he asks us to modify the condition to prohibit signs that "are evidence of affiliation with or membership in" a criminal street gang. The court, however, might reasonably have intended to prohibit a broader category of signs, including signs that insult or challenge a rival gang. Because Jerry does not propose a reasonable alternative to the term "with gang significance" that meets all of the inferable and reasonable purposes of the condition and because the phrase "with gang significance" does not grant the probation officer unfettered discretion, we reject his vagueness claim.

Jerry argues the condition does not clearly impose a personal knowledge requirement. While the court might have articulated the condition better, we believe its meaning is clear. We construe the condition to require Jerry to know, or to have been informed by law enforcement or his probation officer, that certain clothing or signs have gang significance before he can be charged with violating this condition for wearing or displaying such clothing or signs.

4. *Gang Body Art*

Jerry challenges the condition that he "not obtain any piercing, voluntary eyebrow or hair shaving with gang significance or not in compliance with Penal Code section 652(a)." He argues the condition is overbroad because Penal Code section 652, subdivision (a) does not apply to him, the phrase "with gang significance" is vague, and

the condition lacks a personal knowledge requirement. The People agree that a personal knowledge requirement should be added, but dispute his other arguments.

We have already rejected Jerry's challenge to the "with gang significance" language. Regarding the Penal Code section 652 language, the People argue that Jerry's claim is forfeited because it "requires the appellate court to review the record to determine his birthdate." They cite the general rule that facial constitutional challenges to probation conditions as overbroad may be raised for the first time on appeal because they are pure questions of law, but similar claims that require reference to the particular sentencing record developed in the trial court, or requiring additional factual findings, are subject to forfeiture. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888.) However, Jerry's birthdate is an undisputed fact. Generally an application of the law to undisputed facts is a pure question of law for purposes of appellate review. (See *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 382–386.) We conclude there was no forfeiture.

On the merits of the Penal Code section 652 claim, we note that subdivision (a) of the statute provides: "It shall be an infraction for any person to perform or offer to perform body piercing upon a person under the age of 18 years, unless the body piercing is performed in the presence of, or as directed by a notarized writing by, the person's parent or guardian." Jerry argues the language in the probation condition that refers to this section is overbroad because the statute does not apply to Jerry, who was 18 at the time the condition was imposed. However, if the statute does not apply to Jerry, the condition does not affect any of Jerry's conduct and thus is not overbroad in the sense that it reaches more constitutionally-protected conduct than is reasonably related to Jerry's crime and rehabilitation. The People suggest that Jerry may be bound by the statute notwithstanding his age. However, if the court intended the condition to carry this meaning, the condition would be void for vagueness because the court did not give Jerry sufficient notice of such an interpretation. We construe the "section 652(a)" language to require Jerry to comply with the literal language of that statute—which by its terms is inapplicable to Jerry. Because the statute cannot reach any of Jerry's conduct, the language does not render the condition overbroad.

We order the condition modified to include a personal knowledge requirement.

5. *Remaining Conditions*

Jerry argues that four other probation conditions should be modified to add personal knowledge requirements. The People agree. We order the conditions to be so modified.

D. *Correction of Clerk's Transcript*

The parties also agree that the clerk's transcript should be corrected in two places to indicate that the petition was sustained following a contested jurisdiction hearing rather than following an admission of the offense by Jerry. We shall order the transcript to be so corrected.[7] (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

III. DISPOSITION

The court's jurisdictional finding is affirmed. The dispositional order is affirmed in part, modified in part, and reversed in part. The case is remanded for further proceedings consistent with this opinion.

The probation condition providing that the "Subject shall not be in the following areas known to be where gang members meet or get together for gang-related activity" is stricken. On remand, the court may reinstate the condition if it specifies "the following areas" mentioned in the condition or directs the probation officer to do so.

The probation condition providing that the "Subject shall not participate in any gang-related activity or any activity the Subject knows is prohibited by the probation officer as gang-related activity" is modified to read: "The Subject shall not knowingly participate in any gang-related activity."

The probation condition providing that the "Subject shall not obtain any piercing, voluntary eyebrow or hair shaving with gang significance or not in compliance with Penal Code section 652(a)" is modified to read: "The Subject shall not knowingly obtain

[7] The parties agree that the check marks in "Section E" of the amended "Juvenile Detention Disposition Report" should be deleted. One of those check marks, however, indicates that Jerry was represented by counsel at the jurisdiction hearing. We assume the parties did not intend to request that this check mark be removed.

any piercing, voluntary eyebrow or hair shaving with gang significance or not in compliance with Penal Code section 652, subdivision (a)."

The probation condition providing that the "Subject shall not possess any graffiti materials, including, but not limited to, acid, spray paint cans, marker pens, 'white-out,' and liquid shoe polish" is modified to read: "The Subject shall not knowingly possess any graffiti materials, including, but not limited to, acid, spray paint cans, marker pens, 'white-out,' and liquid shoe polish."

The probation condition providing that the "Subject shall not be in possession of any paging devices or any other portable communication equipment, including, but not limited to, scanners, without the express permission of the probation officer" is modified to read: "The Subject shall not knowingly be in possession of any paging devices or any other portable communication equipment, including, but not limited to, scanners, without the express permission of the probation officer."

The probation condition providing that the "Minor shall not access or participate in any social networking site, including, but not limited to, myspace.com[] and facebook.com. All Internet usage is subject to monitoring by the probation officer, parents or school officials" is modified to read: "The Minor shall not knowingly access or participate in any social networking site, including, but not limited to, myspace.com and facebook.com. All Internet usage is subject to monitoring by the probation officer, parents or school officials."

The probation condition providing that the "Subject shall not be on the Internet without school or parental supervision" is modified to read: "The Subject shall not knowingly access the Internet without school or parental supervision."

The maximum term of confinement language in the May 9, 2013 disposition order (copied at p. 177 of the clerk's transcript) is corrected to read: "Maximum confinement time set by the Santa Clara County Juvenile Court at the time the court sustained the petition, April 16, 2013, is eight (8) years."

The amended copy of the Juvenile Detention Disposition Report (copied at p. 103b of the clerk's transcript) shall be further corrected to remove all check marks in

Section E, "Admonishments & Waivers," except for the check mark in the box by the phrase, "Minor represented by counsel."

_____
BRUINIERS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.